

A Certificate of Resale must contain the items of information set out at 86 Ill. Adm. Code 130.1405(b). (This is a GIL).

June 22, 1999

Dear Ms. Xxxxx:

This letter is in response to your letter dated April 22, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

IN AN EFFORT TO BE IN COMPLIANCE AND TO RENDER OUR BEST SERVICE TO OUR CUSTOMERS, WE ARE CURRENTLY UPDATING OUR TAX INFORMATION ON ISSUES IN YOUR STATE WITH REGARDS TO OUR OBLIGATION TO COLLECT SALES AND/OR USE TAX IN YOUR STATE.

WE ARE REQUESTING IN WRITING A LETTER RULING ON:

1. 'THIRD PARTY DROP SHIPMENT'. THE TYPICAL STRUCTURE OF THE TRANSACTION FINDS AN OUT-OF-STATE DEALER (A) REGISTERED FOR THE COLLECTION OF SALES AND USE TAX IN 'SAID' STATE. (A) SHIPS THE PRODUCT TO A POINT IN 'SAID' STATE TO (B)'S CUSTOMER (C). MY QUESTION IS WHAT IS (A)'S RESPONSIBILITY FOR SALES OR USE TAX?
2. RESALE CERTIFICATE FROM (C). IF MY CUSTOMERS' CUSTOMER (B)'S (C), ISSUES A VALID RESALE TO (B), CAN I ACCEPT THAT TO RELIEVE ME FROM COLLECTING TAX?
3. HOW LONG IS A BLANKET RESALE CERTIFICATE VALID?
4. WE SELL STORE FIXTURES. WE SEPARATELY STATE ON EACH INVOICE:
  - A. NET FOR PRODUCT
  - B. FREIGHT - BY COMMON CARRIER
  - C. DELIVERY - BY OUR TRUCK
  - D. INSTALLATION - CONTRACTED (NOT DONE BY OUR EMPLOYEES)WHICH ITEMS ARE TAXABLE?

YOUR RESPONSE TO THESE ISSUES IS GREATLY APPRECIATED. PLEASE MAIL OR FAX ##### AS SOON AS POSSIBLE.

What you have described is a drop-shipment situation in which an out-of-State seller who is registered with Illinois (A) makes a sale to an out-of-State

company (B), who is not registered with Illinois, and drop-ships the items to B's customer (C) located in Illinois.

As a seller required to collect Illinois tax, Company A must either charge tax or document an exemption when it makes a delivery in Illinois. In order to document the fact that the sale to Company B is a sale for resale, A must obtain a Certificate of Resale from its customer (B). Because the sale involves a delivery to an Illinois location, the Certificate of Resale must be valid in Illinois and contain the items of information required by 86 Ill. Adm. Code 130.1405(b), enclosed. If Company B does not provide acceptable Illinois documentation, seller A will be required to charge and collect tax from B on A's gross receipts from the transaction.

Assuming B has no nexus with Illinois, it is unlikely that it will be registered with Illinois. If that is the case, and if B has no contact with Illinois which would require it to be registered as an out-of-State Use Tax collector for Illinois, then it could obtain a resale number which would provide it the wherewithal to supply a required number to A in conjunction with a Certificate of Resale. We hope the following descriptions of out-of-State Use Tax collectors and persons who qualify for resale numbers will be useful.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or who sells items of tangible personal property which are located in Illinois at the time of sale. The Illinois retailer is then liable for Retailers' Occupation Tax on gross receipts of sales and must collect the corresponding Use Tax incurred by purchasers.

So long as B does not accept purchase orders in Illinois and so long as the items it sells are not located in Illinois at the time it sells them, it need not register as a retailer.

Out-of-State sellers who fall under the definition of a "retailer maintaining a place of business in this State" (see 86 Ill. Adm. Code Sec. 150.201(i), enclosed), must register to collect Illinois Use Tax from Illinois customers and remit that tax to the Department. See 86 Ill. Adm. Code Sec. 150.801(c), enclosed. The retailer must collect and remit Use Tax to the State on behalf of his Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The provisions of this regulation are subject to the recent U.S. Supreme Court ruling of Quill v. North Dakota, 112 S. Ct. 1902 (1992), in which the Supreme Court set forth guidelines for determining what nexus requirements must be met before a business is properly subject to a state's tax laws. Quill invoked a two-prong analysis consisting of 1) whether the Due Process Clause is satisfied, and 2) whether the Commerce Clause "substantial nexus" test is met before the state can impose tax collection responsibilities.

The due process test will be met if requiring the retailer to collect state sales tax is fundamentally fair to the retailer. If the retailer intentionally

avails itself of the benefits of the taxing state's economic market, then due process is satisfied, Quill at 1910.

Notwithstanding the fact that due process has been met, a business must also have a physical presence in the taxing state in order for the "substantial nexus" test to be met under the Commerce Clause and before a state can impose tax collection responsibilities on an out-of-State retailer. A physical presence does not mean simply an office or other physical building. Under Illinois tax law, it also includes the presence of any representative or other agent of the seller. The representative need not be a sales representative and it is immaterial for tax purposes that the representative's presence is temporary.

If B does not fall within the definition of a "retailer maintaining a place of business in this State", it need not register as an out-of-State Use Tax collector.

Resale numbers are issued to persons who make no taxable sales in Illinois but who need the wherewithal to provide suppliers with Certificates of Resale when purchasing items which will be resold. So long as B does not act as an Illinois retailer and so long as it does not fall under the definition of a "retailer maintaining a place of business in this State", its sales to Illinois customers are not subject to Illinois Retailers' Occupation Tax liability and it cannot be required to act as a Use Tax collector. So long as this is true, it qualifies for a resale number which does not require the filing of tax returns with the Department. The requirements for obtaining a resale number are set out in 86 Ill. Adm. Code 130.1415, enclosed.

Please note that the fact that B may not be required to act as a Use Tax collector for Illinois does not relieve its Illinois purchasers of Use Tax liability. Therefore, if B does qualify for a resale number, its customers would have to pay their tax liability directly to the Illinois Department of Revenue.

Section 2c of the Retailers' Occupation Tax Act contains the following provision that would allow "other evidence" to be submitted by a purchaser to document the fact that its sale is for resale:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale." 35 ILCS 120/2c

Such evidence could consist of, for example, an invoice from B to its customer, showing that the item was actually resold, along with a statement from B explaining why it had not obtained a resale number and certifying that the purchase was a purchase for resale in Illinois. While "other evidence" is acceptable under the law, we prefer that B obtain a resale number and provide that number on a Certificate of Resale. There is a strong possibility that an

Illinois tax auditor will scrutinize "other evidence" more closely than a Certificate of Resale.

When all his purchases are for resale purposes, a purchaser may provide his seller with a blanket certificate of resale. A blanket certificate can also be used to designate that a certain percentage of purchases made from a specific seller will be for resale. In either case, blanket certificates should be kept current. If the specified percentage changes, a new certificate should be provided. All certificates should be updated no less frequently than every three years. See 86 Ill. Adm. Code 130.1405 (c).

The question of whether delivery or freight charges may be deducted by retailers in calculating the tax liability depends not upon the separate billing of such delivery or freight charges but upon whether the charges are included in the selling prices of the property or are contracted for separately by purchasers and retailers. Also, to the extent that such charges exceed the costs of shipping, transportation or delivery, the portion of the charges that exceed the actual freight or delivery costs are subject to tax. The best evidence that freight or delivery charges are agreed to separately and apart from selling prices is separate and distinct contracts for freight or delivery. Alternatively, documentation in the records of sellers that purchasers had options of taking delivery of the property at sellers' locations, for the agreed purchase prices, or having delivery made by sellers for the agreed purchase prices plus ascertainable delivery charges, may suffice. Please refer to 86 Ill. Adm. Code 130.415, enclosed.

Please be advised that when tangible personal property is sold at retail and the seller installs such tangible personal property for the purchaser, the installation charges are included in gross receipts subject to tax unless they are the subject of a separate agreement. A separate agreement would include an invoice which separately lists the installation charge and is also signed by the customer. See 86 Ill. Adm. Code 130.450, enclosed. Please be informed that if tangible personal property, such as fixtures, is permanently affixed to real estate, different rules would apply. In this case, the construction contractor permanently affixing the fixtures to real estate is considered the end user of the tangible personal property permanently affixed to real estate, and owes Use Tax on his cost price of such tangible personal property. See the enclosed copies of 86 Ill. Adm. Code 130.1940 and 2075.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

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If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Karl W. Betz  
Associate Counsel

KWB:msk

Enc.